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NO.

UNITED STATES SUPREME COURT

AUGUST TERM 1982

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NICK DEMOS,

PLAINTIFF-PETITIONER

VS.

COMMERCIAL UNION INSURANCE
COMPANY, INC.,

DEFENDANT-RESPONDENT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Is a defamatory affirmative defense beyond the jurisdiction of a United States District Court to determine, made within an action over which the Court does have jurisdiction, privileged against a claim of damages for defamation?

Answered Yes by the Court of Appeals.

2. Is the disclosure of defamatory accusations made in defendant's pleadings to persons not parties to the judicial proceedings to which such pleadings relate privileged against a claim of damages for defamation?

Answered Yes by the Court of Appeals.

PARTIES TO PROCEEDING

All parties to the proceeding in the Court of Appeals are named in the caption in this Court.

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STATEMENT OF JURISDICTION

The unpublished Order and Judgment of which review is asked were entered by the Court of Appeals for the Seventh Circuit March 18, 1983.

Certiorari is sought pursuant to 28 U.S.C. §1254(1) within the time provided in 28 U.S.C. §2101(c).

NO STATUTES INVOLVED

The questions presented involve no constitutional or statutory provisions. They are questions of common law relating to the scope of the privilege against claim of damages for defamation relating to defamations made within pleadings in actions in a United States District Court and repetition or publication of those defamations outside the judicial proceedings.

STATEMENT OF THE CASE

This action was brought in the District Court pursuant to 28 U.S.C. §1332, the parties being citizens of different states, and the amount in controversy exceeding $10,000.00.

Petitioner commenced an action against defendant for damages caused by certain defamations. There are three basic causes of action plus three punitive damages causes. The claims are (1) that defendant pleaded as an affirmative defense in two federal court actions that plaintiff violated a Wisconsin criminal statute which affirmative defense is not within the jurisdiction of the court to determine; (2) that defendant disclosed the fact of such accusations and other defamatory accusations in such pleadings to persons not parties to the judicial proceedings involved; and (3) that such disclosure was made with actual or constructive knowledge that such persons would further circulate the defamatory accusations. The defendant moved to dismiss based upon a claim of privilege of defamation in pleadings. The district court granted such motion, and petitioner appealed from such decision.

The Court of Appeals for the Seventh Circuit affirmed.

This matter having been determined on a Motion to Dismiss for failure to state a cause of action, the allegations of the complaint are to be taken as true. In digest, these are as follows:

In each of two civil actions in United States District Court involving a fire insurance policy issued by defendant, the defendant pleaded the following as a separate Affirmative Defense:

> "Affirmative Defense
>
> Defendant Commercial Union Insurance Company alleges upon information and belief that plaintiff Nick Demos has violated Sec. 943.02 Wis. Stats., Arson of Building."

The fact that defendant has made such accusations has been disclosed by defendant to persons other than those involved in such judicial proceedings. Such accusations are false and defamatory. In addition to such accusations, defendant has made other defamatory accusations in such Answers accusing plaintiff of participation in arson, and of fraud. Defendant, its agents, or

attorneys have disclosed the fact that such accusations have been made by defendant to persons not parties to the judicial proceedings involved.

Defendant, its agents, or attorneys knew or should have known that other persons to whom the fact of such accusations was disclosed, whether such disclosure was made to such persons within the judicial proceedings or without the judicial proceedings, would be likely to disclose such fact to additional persons. The language used in such accusations was not necessary to the pleadings, but was of a nature to shock and to create a likelihood of being repeated or reported outside of the judicial proceedings. Such circulation of such accusations as has occurred outside of the judicial proceedings is due either to the intention of defendant, its agents or attorneys, or through their negligence.

Plaintiff has sustained damaged to his reputation and has sustained mental, emotional, and physical distress as a result of defendant's defamations.

REASONS FOR ALLOWANCE OF WRIT

The two precise questions presented for review are issues of federal common law which have not been previously decided by this court, or as far as counsel can ascertain by any other American Court. The questions relate directly to the integrity and fairness of proceedings on the federal courts and to the extent that filing of defamatory pleadings in federal court shield the defamor from repetition of its defamations outside the judicial proceedings. The rationale of the Court of Appeals in its decision appears to be contrary to the reasoning in prior decisions of this Court.

The petitioner's causes of action are based upon two different events. The first

is pleading of a defamatory accusation in an affirmative defense alleging violation of a Wisconsin criminal arson statute. As agreed by the Court of Appeals, the Federal District Court has no jurisdiction to determine that affirmative defense, i.e. it has no jurisdiction to try the petitioner for a Wisconsin crime. Thus, the court has no jurisdiction to determine the defamatory affirmative defense pleaded by the defendant. On this issue the Court of Appeals held that if there is jurisdiction over the action, the privilege against claims for defamation extends even to those issues over which the Court does not have even arguable jurisdiction.

The second event is defendant's publication of various defamations made in pleadings to persons outside of the judicial

proceedings. On this issue the Court of Appeals held that as a matter of public policy repetition outside the proceedings is shielded from defamation liability since pleadings are public documents.

Both of these holdings extend the privilege beyond the scope of the public policy giving rise to the privilege.

The general American rule of privilege against defamation in judicial proceedings is exemption from liability for defamatory words published or spoken in the course of judicial proceedings where the statements are pertinent and relevant to the issues of that judicial proceedings. Spoehr vs. Mittelstadt, 34 Wis. 2d 653 (1967). This rule which requires the statement to be pertinent and relevant is less liberal than the English rule which provides a privilege to any defamation occurring in the course of judicial proceedings. See Anno.: Libel

and slander: lack of jurisdiction as destroying privilege of defamatory allegations on statements in judicial proceedings. 158 ALR 592.

One limitation on the privilege is that there is no exemption from liability if the defamatory statement is on a matter outside the jurisdiction of the court. This limitation was established in Buckley v. Wood, 4 Coke 14b, 76 Eng. Reprint 888 (1591) and has remained unchanged through English and American law for the 452 years since that decision.

In Buckley v. Wood, the defendant exhibited a bill in the Star-chamber charging the plaintiff with various matters properly examinable in that court, and also charging plaintiff as "a maintainer of pirates and murderers" and "a procurer of murders and piracies". These latter charges were not within the jurisdiction of the Star-chamber. The plaintiff sued for slander in the Kings Bench. The report of the decision reads:

> "It was resolved and adjudged, that for the said words not examinable in the said court [Star-chamber], an action on the case lies, for that cannot be in the course of justice; for the court has no power or jurisdiction to do that which appertains to justice, nor to punish the said offences, and if such matters may be inserted in bills exhibited in so high and honourable a court, in great slander of the parties, and they cannot answer it to clear themselves of the crimes, as to recover damages for the great injury and wrong done them, great inconvenience will ensue; but the said libel, without any remedy given the party, will remain always on record, to his shame and infamy, which will be full of great inconvenience." 4 Coke 14b, pp. 293-4.

The rule that lack of jurisdiction destroys the privilege of defamatory allegations or statements made in judicial proceedings established in Buckley has also always been the rule in the United States. See 158 ALR 592, supra. The earliest U.S. case cited int he ALR is Milam v. Burnsides (1803) 3 SCL (1 Brev.) 295. In addition to the cases cited in such annotation see

Kent v. Connecticut Bank & Trust Co., N.A., 386 So 2d 902 (1980); DiBlasio v. Kolodner, 197 A 2d 245 (1964); Sowder v. Nolan, 125 A 2d 52 (1956); Parker v. Kirkland, 18 NE 2d 709 (1939); Owen v. Kronheim, 304 F. 2d 957 (DC Cir 1962) all of which hold that there is liability for defamation uttered in judicial proceedings if there is lack of jurisdiction to determine the issue to which the defamation pertains.

Buckley v. Wood is the only case in Anglo-American jurisprudence that counsel has found which deals with the precise issue in the first question for review. The report of that case shows that the Star Chamber held jurisdiction over the case presented but did not have jurisdiction over the particular issues on which defamation was charged and the privilege did not extend to those issues. The American decisions are cases in which jurisdiction was lacking over the entire case.

This Court's first and principal decision on the law of libel and slander is White v. Nichols, 3 How. 266, 11 L. Ed. 591 (1845). There the court analyzed the English and American decisions and reached its determination of the law of libel. The citations it quotes recognize the requirement that a tribunal have jurisdiction, eg.:

> "... a false complaint, made with express malice or without probable cause to a body having competent authority to redress the grievance complained of, ..." 11 L. Ed. at 602 (emphasis supplied)

> "... that the application to a tribunal competent to redress the supposed grievance ..." 11 L. Ed. at 602 (emphasis supplied)

The reasoning of this court does not support the exception to the requirement of jurisdiction created by the Court of Appeals.

The reason for the defamation privilege is to allow the free uninhibited working of the judicial process. The same public policy underlies other judicial proceeding

privileges as to false imprisonment, malicious prosecution, and abuse of process.[1] This Court recognized the requirement that there must be jurisdiction before even a federal judge is protected from liability for civil damages as early as Bradley v. Fisher, 13 Wall. 523; 20 L. Ed 646 (1872):

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1. Thus, judicial officers acting in the exercise of their jurisdiction are exempt from civil liability for malicious prosecution, Bromund v. Holt, 129 NW 2d 149, 24 Wis. 2d 336 (1964); or false imprisonment, Parish v. Smoot, 58 So 2d 534 (1952); Beckman v. Cline, 10 So 2d 419 (1942); Sukeforth v. Thegen, 256 A 2d 162 (1969); Douglas v. State, 52 NYS 2d 857 (1945); Vona v. State, 54 NYS 2d 453 (1945); Troutman v. State, 72 NYS 2d 177 (1943). But judicial officers acting outside of their jurisdiction are liable for civil damages. Id. See also 173 ALR 802 Anno.: Civil Liability of Judicial Officer for False Imprisonment; §5 Action Wholly Without Jurisdiction; 173 ALR 835 Anno.: Civil Liability of Judicial Officer for Malicious Prosecution or Abuse of Process; §4 Action Without Jurisdiction; 28 ALR 2d 646, Anno.: Civil Liability of Law Enforcement Officers for Malicious Prosecution; §4 Conduct Beyond Scope of Official Authority; 30 ALR 3d 523 Anno.: Liability for False Imprisonment Predicated Upon Institution or Conduct in Connection with Insanity Proceedings.

> "Where there is clearly no jurisdiction oer the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. *** Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority." 20 L. Ed at 651.

Bradley is considered the definitive case and has been cited often by the Court. For example, see Pierson v. Ray, 386 US 547, 554, (1967).

The second question for review is whether the fact that defamations are made in pleadings in federal district court shields the defamer from liability for defendant's publication outside of the judicial proceedings of the fact of defen-

dant's making allegations of arson, insurance fraud, and criminal arson within the proceedings. The public policy for the exemption from liability is that:

> "suitors may resort to the courts established by law to hear their causes, and that, having so done, they may, without fear of being sued for a libel, allege whatever they choose in support of their cause." Johnson v. Brown, (1878) 13 W Va 71, quoted at 158 ALR 593.

The public policy does not, however, give a litigant a license to spread its defamations beyond the judicial proceedings. In the present case the District Court held:

> "Once a complaint or answer is filed in court, it becomes a public record. Defendant cannot be held accountable for subsequent discrimination of the information."

and the Court of Appeals held:

> "Disclosure of defendants allegations told the public nothing that it did not have the power to discover from a trip to the courthouse."

Petitioner contends that this extension of the defamation privilege is not supported by any decision anywhere, and not a policy which the Supreme Court shall allow in the federal court system. It is extension of privilege which in no way serves the public policy underlying that privilege, and permits the use of federal court pleadings to free a litigant to defame the opposing party outside the court with impunity.

> "The fact that any one who wishes may, on other grounds, have access to such papers for examination, if any such right exists, has no bearing on the question. The degree of publicity likely to be so accomplished is trifling in comparison with general publication, and at best, results incidentally from a public policy of nondiscrimination by a mere clerk which is in no wise promoted by spreading abroad the information which one may acquire by such inspection. In absence of dominating public interest,

surely the individual ought not to be subject to such assaults upon his character and reputation as may result from general publication of charges which may thus be made. The author of a pleading is broadly privileged in asserting his claims against his opponent, and may, and often does, make the most damaging charges with little or no foundation. He may make them with no expectation of proving them, may, with no purpose of ever proceeding further with his action, and yet furnish most salacious matter for the enterprising reporter upon whose industry the pleader may indeed have counted to render his charges effective to injure is opponent before the public, though he never expected any effect for them in court." Ilsley v. Sentinel Co., 133 Wis. 20, 25-6, 113 N.W. 425 (1907).

Respectfully submitted,

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By _____
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NO.

UNITED STATES SUPREME COURT

AUGUST TERM 1982

ON WRIT OF CERTIORARI TO
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NICK DEMOS,

PLAINTIFF-PETITIONER

VS.

COMMERCIAL UNION INSURANCE
COMPANY, INC.,

DEFENDANT-RESPONDENT

APPENDIX

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UNPUBLISHED ORDER
NOT TO BE CITED PER
CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED: NOVEMBER 3, 1982)

March 18, 1983

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. DUDLEY B. BONSAL, Senior District Judge*

NICK DEMOS,

Plaintiff-Appellant,

No. 82-1512
vs.

COMMERCIAL UNION INSURANCE CO., INC.,

Defendant-Appellee

Appeal from the United States
District Court for the Eastern
District of Wisconsin
No. 81 C 1196
Terence T. Evans, Judge.

O R D E R

This diversity action arose out of a suit filed by plaintiff in Wisconsin state court, and removed by defendant to federal district court, seeking recovery of proceeds under a fire insurance policy. Defendant

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* Dudley B. Bonsal, Senior District Judge for the Southern District of New York is sitting by designation.

raised several affirmative defenses in its answer; that the fire was started intentionally by plaintiff; that plaintiff had attempted to defraud defendant by starting the fire; and that plaintiff had violated Wis. Stat. §943.02 (1979), by committing arson. Based upon this last affirmative defense plaintiff filed the present action charging defendant with defamation. Plaintiff argued that defendant was not privileged to make the allegation of arson and that defendant had disclosed this allegation to third persons not connected with the judicial proceedings. The district court dismissed the complaint and plaintiff brought this appeal.

I

Plaintiff concedes that, as a general proposition, there is no liability for the use of defamatory language in the course of judicial proceedings when the statements are relevant to those proceedings. See Bromund v. Holt, 24 Wis. 2d 336, 129 N.W.2d 149 (1964); Schafer v. Suckle, 21 Wis. 2d 425, 124 N.W.2d 577 (1963). He also appears to concede that the charge of arson is sufficiently relevant to the suit so as to fall within the ambit of the privilege. Plaintiff further admits that defendant's allegation that plaintiff intentionally burned the building is privileged, but argues that labelling this as arson is actionable. He reaches this conclusion by arguing that a defamatory statement otherwise privileged is actionable if it concerns a matter outside the jurisdiction of the court. As a federal district court does not have jurisdiction to convict him of violation of a state criminal statute, plaintiff reasons, the allegation that he committed arson in violation of state law is not privileged.

In advancing this argument plaintiff has overstated the scope of the exception to the privilege to make defamatory statements in the course of judicial proceedings. The absence-of-jurisdiction exception to the privilege is limited to those cases in which the court does not have jurisdiction over the suit. Cf. Kent V. Connecticut Bank & Trust Co., 386 So. 2d 902 (Fla. Dist. Ct. App. 1980), and cases cited therein. In this situation there is a valid reason for removing the privilege; the defamed party will not have an opportunity to clear himself of the charges. Id. at 903.

In the case before us, however, the state court, and the federal district court to which the suit was removed, had jurisdicton over plaintiff's suit for recovery of the fire insurance proceeds. Plaintiff will have ample opportunity to prove that he did not intentionally burn the building in issue and the court will have jurisdiction to enter a judgment reflecting that fact if plaintiff prevails.

Plaintiff has also attempted to raise a host of problems that will accompany a charge of criminal conduct made in a civil proceeding, such as the appropriate burden of proof and the availability of procedural protections normally accorded a criminal defendant. These fears, although evidencing a fertile imagination, are spurious. This is not a criminal proceeding and plaintiff will in no way be subjected to criminal penalties should he lose the suit. The claim that plaintiff committed arson, which is no more than a shorthand method of claiming that he intentionally started the fire, will be treated in the same manner as the other affirmative defenses.

We should note that accepting plaintiff's claim would lead to an undesirable result. Under plaintiff's analysis defendant would be free to prove all of the elements of arson, but would be subject to civil liability for mentioning the word "arson" or the criminal nature of plaintiff's actions in arguing to the jury or at any other stage of the proceedings. This self-censorship, which would be difficult to achieve, would serve little purpose.

Although defendant need not have labelled plaintiff's actions as arson, the charge is nevertheless relevant to the proceedings. In determining the availability of the privilege all doubts are to be resolved in favor of relevance, Schafer v. Suckle, supra, and charges of criminal conduct are relevant to a civil suit when related to the cause of action. See Bussewirtz v. Wisconsin Teachers' Association, 188 Wis. 121, 205 N.W. 808 (1925) (use of the word "feloniously" in a civil counterclaim for conversion not actionable as it was relevant to proceedings).

II

Plaintiff also argues that defendant is liable for disclosure of the allegation of arson to parties not connected with the proceedings. Although he does not make this argument, it appears that plaintiff's theory would impose liability for disclosure of other affirmative defenses raised by defendant as defendant was equally privileged to make any of these allegations in the pleadings. We do not think this a

sensible result and agree with the district court that the statements made in the pleadings, which are public documents, may be disclosed to the public without liability. Disclosure of defendant's allegations told the public nothing that it did not have the power to discover from a trip to the courthouse.

For the reasons stated herein the decision of the district court is AFFIRMED.

Unpublished Per Curiam Order

JUDGMENT - WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 18, 1983

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. DUDLEY B. BONSAL, Senior District Judge*

NICK DEMOS,
Plaintiff-Appellant,

No. 82-1512 vs.

COMMERCIAL UNION INSURANCE CO., INC.,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 81 C 1196
Judge Terence T. Evans

This cause came before the Court for decision on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division.

* The Honorable Dudley B. Bonsal, Senior District Judge for the Southern District of New York, is sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NICK DEMOS and LIGHTHOUSE, INC., a Wisconsin corporation,

Plaintiffs

Civil Action No. 81-C-1195

vs.

COMMERCIAL UNION INSURANCE COMPANY, INC.,

Defendant

NICK DEMOS,

Plaintiff

Civil Action No. 81-C-1195

vs.

COMMERCIAL UNION INSURANCE COMPANY, INC.,

Defendant

DECISION and ORDER

Pending are four actions arising out of a fire on December 22, 1980, which destroyed a building at 1651 Grand Avenue, Racine, Wisconsin. The building housed the Tasters Choice Restaurant owned and operated by Nick Demos. Prior to December 22,

Commercial Union Insurance Company had issued to Demos d/b/a Lighthouse, Inc. a policy of property insurance covering the building and its contents. Commercial Union has denied coverage to Demos for the damage done by the fire, claiming that it was caused by arson committed or arranged by Demos.

In case 81-C-575, Demos seeks to recover payment under the policy for damage to the building. In case 81-C-1195, Demos is attempting to recover for damage to the contents of the building. In case 81-C-592, William M. Wells contends that, through an agreement with Demos, he has an equitable right to the insurance proceeds. Finally, in case 81-C-1196, Demos is suing Commercial Union for defamation.

Motion To Consolidate

(THIS PORTION OF DECISION NOT RELATED TO THIS PETITION FOR CERTIORARI)

Motion To Dismiss 81-C-1196

In 81-C-1196, Demos alleges that in two of the previous actions, 81-C-592 and 81-C-575, in which Demos seeks to recover proceeds under the insurance contract, Commercial Union Insurance Company raised affirmative defenses which are not relevant to the action and which are defamatory. Claiming that the affirmative defenses were set forth in judicial proceedings and are thus privileged, Commercial Union has moved for dismissal of the action.

In both cases, Commercial Union raised affirmative defenses substantially as folows:

"AFFIRMATIVE DEFENSE

"Defendant COMMERCIAL UNION INSURANCE COMPANY alleges that on or about December 22, 1980, the premises commonly known as 1651 Grand Avenue, Racine, Wisconsin, was damaged by fire; that said fire was the product of the intentional act of plaintiff or somecne acting at the direction or control of plaintiff; that such intentional act con-

stitutes fraud upon defendant COMMERCIAL UNION INSURANCE COMPANY; that such fraud voids the policy as to Lighthouse, Inc. and plaintiff NICK DEMOS.

"AFFIRMATIVE DEFENSE

"Defendant COMMERCIAL UNION INSURANCE COMPANY alleges that plaintiff has failed to comply with all of the terms and conditions of said policy; that plaintiff NICK DEMOS has failed to use all reasonable means to save and preserve the property at and after said fire as required by said policy.

"AFFIRMATIVE DEFENSE

"Defendant COMMERCIAL UNION INSURANCE COMPANY alleges that a provision of the policy renders defendant COMMERCIAL UNION INSURANCE COMPANY not liable 'for loss occurring while the hazard is increased by any means within the control or knowledge of the insured;' that an accellerant was spread in several areas of the building known as Tasters Choice Restaurant at or immediately prior to the fire occurring; that the hazard of fire was increased by means within the control or knowledge of the insured.

"AFFIRMATIVE DEFENSE

"Defendant COMMERCIAL UNION INSURANCE COMPANY alleges upon information and belief that plaintiff NICK DEMOS has violated Sec. 943.02, Wis. Stats., Arson of Building."

Demos claims that the allegations are not relevant to either action and that because this court lacks jurisdiction to determine whether a Wisconsin criminal statute has been violated, the allegations go to matters outside the jurisdiction of this court. Demos further claims that the accusations were malicious, that the accusations were maliciously disclosed to persons outside the judicial proceedings, and that "other defamatory accusations" have been made.

In Wisconsin the rule is that defamatory words published or spoken by parties during judicial proceedings are absolutely privileged when the statements bear a proper relationship to the issues. Bergman v. Hupy, 64 Wis. 2d 747 (1974). The privilege applies

to "relevant statements in pleadings and otherwise in the course of judicial proceedings." Bromund v. Holt, 24 Wis. 2d 336, 342 (1964). The test for relevancy in this context is whether it "has any pertinence, no matter how remote, to the controversy and judicial proceedings at hand." Spoehr v. Mittlestadt, 34 Wis. 2d 653, 663 (1967).

The allegations at issue here are relevant to the proceedings. Furthermore, under Rule 8(c) of the Federal Rules of Civil Procedure, defendants are requried to set forth the affirmative defense of fraud. Under Rule 9(b), averments of fraud "shall be stated with particularity." Therefore, defendant is immune from suit for defamation. The other allegations which involve publication of the charges to outsiders must also fall. Once a complaint or answer is filed in court, it becomes a public

record. Defendant cannot be held accountable for subsequent dissemination of the information. The motion to dismiss 81-C-1196 is granted.

(BALANCE OF DECISION IS NOT RELATED TO THIS PETITION FOR CERTIORARI)

IT IS THEREFORE ORDERED that case 81-C-1196 is dismissed.

(OTHER ORDERS NOT RELATED TO THIS PETITON FOR CERTIORARI)

Dated at Milwaukee, Wisconsin, this 22 day of February, 1982.

BY THE COURT:

/S/
Terence T. Evans
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NICK DEMOS,
PLAINTIFF

vs.

COMPLAINT
Case No. 81-C-1196

COMMERCIAL UNION
INSURANCE COMPANY, INC.,
DEFENDANT

NOW COMES the above named plaintiff, by his attorneys, Foley, Foley & Seehawer, S.C., and for his causes of action against defendant, alleges as follows:

FIRST CAUSE OF ACTION

FIRST. This action is commenced pursuant to 28 USC §1332, the parties hereto being citizens of different states and the amount in controversy exceeding $10,000.00.

SECOND. Plaintiff, Nick Demos, is an individual, residing at 1536 Highway H, in the Town of Mt. Pleasant, Racine County, Wisconsin, and is self-employed.

THIRD. Defendant, Commercial Union Insurance Company, is a foreign insurer,

both incorporated and having its principal offices in the State of Wisconsin, with an office within Wisconsin at 10201 W. Lincoln Avenue, West Allis, Wisconsin, 53227.

FOURTH. There is a civil action entitled William M. Wells, plaintiff vs. Commercial Union Insurance Company, Nick Demos, and Lighthouse, Inc., defendants, pending in the United States District Court for the Eastern District of Wisconsin, Case No. 81-C-592, an action involving a fire insurance policy issued by defendant.

FIFTH. In its Answer and Affirmative Defenses served upon the plaintiff in such action and upon the plaintiff herein through their attorneys, and filed with the court, the defendant made the following accusations:

"SIXTH AFFIRMATIVE DEFENSE

> Defendant Commercial Union Insurance Company alleges upon information and belief that defendant Nick Demos has violated Sec. 943.02, Wis. Stats., Arson of Building."

SIXTH. There is a civil action entitled Nick Demos, plaintiff vs. Commercial Union Insurance Company, defendant, pending in the United States District Court for the Eastern District of Wisconsin, Case No. 81-C-575, an action involving a fire insurance policy issued by defendant.

SEVENTH. In its Answer and Affirmative Defenses served and filed in such action the defendant made the following accusation:

"FIFTH AFFIRMATIVE DEFENSE

> Defendant Commercial Union Insurance Company alleges upon information and belief that plaintiff Nick Demos has violated Sec. 943.02, Wis. Stats., Arson of Building."

EIGHTH. The fact that defendant has made such accusations has become known to persons other than those involved in such judicial proceedings.

NINTH. Such accusations are false and defamatory.

TENTH. The Federal District Court has no jurisdiction to determine that any crime under the laws of the State of Wisconsin has or has not been committed by any person.

ELEVENTH. The subject matter of the allegation being outside of the jurisdiction of the Federal District Court, the accusations are not pertinent or relevant to the matters before the Court.

TWELFTH. Such accusations are not within the limited privilege accorded to defamation during the course of judicial proceedings.

THIRTEENTH. Plaintiff has sustained damage to his reputation and has sustained mental, emotional and physical distress as a result of defendant's defamations.

FOURTEENTH. Plaintiff has been damaged in the amount of One Million ($1,000,000.00) Dollars.

SECOND CAUSE OF ACTION

FIFTEENTH. Plaintiff realleges paragraphs First through Twelfth of his First Cause of Action.

SIXTEENTH. Such accusations are malicious.

SEVENTEENTH. Plaintiff is entitled to recover punitive damages from defendant in the amount of Two Million ($2,000,000.00) Dollars.

THIRD CAUSE OF ACTION

EIGHTEENTH. Plaintiff realleges paragraphs First through Twelfth of his First Cause of Action.

NINETEENTH. That in addition to such accusations, defendant has made other defamatory accusations in such answers accusing plaintiff of participation in arson, and of fraud.

TWENTIETH. Upon information and belief, defendant, its agents, or attorneys

have disclosed the fact that such accusations have been made by defendant, to persons not parties to the judicial proceedings involved.

TWENTY-FIRST. That plaintiff has been damaged by defendant in the amount of One Million ($1,000,000.00) Dollars.

FOURTH CAUSE OF ACTION

TWENTY-SECOND. Plaintiff realleges paragraphs Eighteenth to Twenty-First of its Third Cause of Action.

TWENTY-THIRD. That such defamations by defendant are malicious.

TWENTY-FOURTH. That plaintiff is entitled to punitive damages from defendant in the amount of Two Million ($2,000,000.00) Dollars.

FIFTH CAUSE OF ACTION

TWENTY-FIFTH. Plaintiff realleges paragraphs Eighteenth through Twentieth of its Third Cause of Action.

TWENTY-SIXTH. That defendant, its agents or attorneys, knew or should have known that other persons to whom the fact of such accusations was disclosed, whether such disclosure was made to such persons within the judicial proceedings or without the judicial proceedings, would be likely to disclose such fact to additional persons.

TWENTY-SEVENTH. That the language used in such accusations was not necessary to the pleadings, but was of a nature to shock and to create a likelihood of being repeated or reported outside of the judicial proceedings.

TWENTY-EIGHTH. That such circulation of such accusations as has occurred outside of the judicial proceedings is due either to the intention of defendant, its agents or attorneys, or through their negligence.

TWENTY-NINTH. That plaintiff has been damaged by defendant's actions in the amount of One Million ($1,000,000.00) Dollars.

SIXTH CAUSE OF ACTION

THIRTIETH. Plaintiff realleges paragraphs Twenty-Fifth through Twenty-Ninth of its Fifth Cause of Action.

THIRTY-FIRST. Such actions of defendant were intentional and malicious.

THIRTY-SECOND. That plaintiff is entitled to recover punitive damages in the amount of Two Million ($2,000,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against defendant:

1. For the amounts of damages alleged in each of its Causes of Action.

2. For its costs and disbursements.

3. For such further relief as may be proper.

4. Plaintiff demands a twelve (12) member jury.

DATED at Racine, Wisconsin, this 4 day of September, 1981.

FOLEY, FOLEY & SEEHAWER, S.C.
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NICK DEMOS,
Plaintiff

vs.

COMMERCIAL UNION INSURANCE COMPANY, INC., Defendant

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Case No. 81-C-1196

Defendant COMMERCIAL UNION INSURANCE COMPANY, by its attorneys Robins, Zelle, Larson & Kaplan and Piette, Knoll & Nelson, by Ronald L. Piette, hereby moves the court pursuant to Rule 12(b)(6) Federal Rules of Civil Procedure to dismiss the above captioned action on the ground that it fails to state a claim against defendant upon which relief can be granted.

Dated this 7th day of October, 1981.

ROBINS, ZELLE, LARSON & KAPLAN
33 South Fifth Street
Minneapolis, MN 55402

PIETTE, KNOLL & NELSON
Attorneys for defendant
Commercial Union Insurance Co.

By /S/
RONALD L. PIETTE

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Office - Supreme Court, U.S.
FILED
JUL 19 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-2073

UNITED STATES SUPREME COURT
AUGUST TERM 1982

NICK DEMOS,

Plaintiff-Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY, INC.,

Defendant-Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

RONALD L. PIETTE
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LISTING OF INTERESTS

Defendant-Respondent COMMERCIAL UNION INSURANCE COMPANY, [incorrectly designated COMMERCIAL UNION INSURANCE COMPANY, INC.] is a wholly owned subsidiary of Commercial Union Corporation, a Delaware Corporation.

Subsidiaries (other than wholly owned) of Defendant-Respondent COMMERCIAL UNION INSURANCE COMPANY are:

1. Echlin, Irvin & Crowell & Company, a Texas Corporation;

2. Bishop Insurance Agency, Ltd., a Hawaiian Company.

All affiliates of Defendant-Respondent COMMERCIAL UNION INSURANCE COMPANY are sister corporations and wholly owned by Commercial Union Corporation. These are:

Commercial Union Special Risks, Inc.

Commercial Union Personal Lines, Inc.

Special Underwriting Group, Inc.

Commercial Union Lines, Inc.

Commercial Union Leasing Corporation

Commercial Union Management, Inc.

American Employers Insurance Company

Beacon Advertising Corporation

The Employers Fire Insurance Company

Falcon Special Services Insurance Agency

Falcon Insurance Company

The Northern Assurance Company of America

Beacon Risk Management Services, Inc.

Commercial Union Investment Management Corporation

Eggret Holding Corporation

Commercial Union Automation Services Inc.

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Section 802.03(2), Wis. Stats., 1979-80 3, 8

ISSUES PRESENTED

Defendant-Respondent, COMMERCIAL UNION INSURANCE COMPANY, (hereinafter COMMERCIAL UNION) accepts plaintiff-petitioner, NICK DEMOS' (hereinafter DEMOS) statement as to the questions presented for review.

STATUTES INVOLVED

There are no federal constitutional provisions or federal statutes involved. However, Rules 8(c) and 9(b) Fed.R.Civ.P. are pertinent to COMMERCIAL UNION'S defense in this case.

8(c) Fed.R.Civ.P. provides:

> "Affirmative Defenses. In pleading to a preceeding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statutes of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires,

shall treat the pleading as if there had been a proper designation."

9(b) Fed.R.Civ.P. provides:

"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Wisconsin Statutes pertinent to the case are Section 802.02(3), Wis. Stats., 1979-80 and Section 802.03(2), Wis. Stats. 1979-80.

Section 802.02(3), Wis. Stats., 1979-80, provides:

"(3) AFFIRMATIVE DEFENSES. In pleading to a preceeding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of a condition subsequent, failure or want of consideration, failure to mitigate damages, fraud, illegality, immunity, incompetence, injury by fellow servants, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, superseding cause

and waiver. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall permit amendment of the pleading to conform to a proper designation. If an affirmative defense permitted to be raised by motion under s. 802.06(2) is so raised, it need not be set forth in a subsequent pleading."

Section 802.03(2), Wis. Stats., 1979-80, provides:

"(2) FRAUD, MISTAKE AND CONDITION OF MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

STATEMENT OF THE CASE

COMMERCIAL UNION accepts DEMOS' statement of the case for the purposes of this Petition only and without agreeing to the truth of all the assertions contained therein.

REASONS FOR DISALLOWANCE OF WRIT

UNITED STATES SUPREME COURT REVIEW IS NOT APPROPRIATE IN THIS CASE.

Review of this case by the United States Supreme Court is not appropriate. There is no basis or need for review. There is only one question presented involving federal law. That question involves the jurisdiction of a U.S. District Court to hear and make appropriate findings upon COMMERCIAL UNION'S affirmative defenses of fraud, arson and illegality set up in companion cases involving DEMOS and COMMERCIAL UNION. The other questions presented involve Wisconsin's common law of defamation.

I. FEDERAL DISTRICT COURT HAS JURISDICTION OVER THE CASE.

28 U.S.C. Section 1332 provides that federal district courts shall have original jurisdiction of all civil actions were the matter in controversey exceeds the sum of $10,000 and is between citizens of different states. DEMOS is a resident of the State of Wisconsin. COMMERCIAL UNION is a

resident of the State of Massachusetts. The amount demanded by DEMOS as relief in the two civil actions exceeds $10,000. The diversity and monetary requirements of 28 U.S.C. Section 1332 are satisfied. The federal district court has jurisdiction over the two civil actions, the affirmative defenses to which, DEMOS now complains of.

DEMOS does not dispute the fact that the district court has jurisdiction over the two civil cases, which are still pending. DEMOS contends that the district court does not have jurisdiction over the affirmative defenses set forth by COMMERCIAL UNION and thus COMMERCIAL UNION is not privileged in making those 'libelous' assertions. Those affirmative defenses set up fraud, arson and illegality on the part of DEMOS. COMMERCIAL UNION contends that since the district court has jurisdiction of the cases, COMMERCIAL UNION is privileged to assert affirmative defenses

which are pertinent to these cases. Not only is COMMERCIAL UNION privileged to assert these affirmative defenses, but it is required to do so.

Rules 8 and 9, Fed.R.Civ.P. pertain to the form and content of pleadings in civil cases over which district courts have jurisdiction. Rule 8(c) requires that:

> "In pleading to a preceeding pleading, a party shall set forth affirmatively. . .fraud [and] illegality. . ."

Rule 9(b), Fed.R.Civ.P. states:

> "In all averments of fraud. . ., the circumstances constituting fraud. . .shall be stated with particularity."

A failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. Henry vs. First Nat. Bank of Clarksdale, (C.A.5th, 1979), 595 F.2d 291, certiorari denied 100 S.Ct. 1020, 444 U.S. 1974, 62 L.Ed. 756; Radio Corp. of America

vs. Radio Station KYFM, Inc., (C.A.7th, 1943), 132 F.2d 829. This proposition has been announced by numerous federal courts in cases involving a variety of affirmative defenses including illegality. Stanish vs. Polish Roman Catholic Union of America, (C.A.7th, 1973), 484 F.2d 713; Seaboard Sur. Co. vs. Harbison, (C.A.7th, 1962), 304 F.2d 247; Howard Indus. Inc. vs. Rae Motor Corp., (C.A.7th, 1959), 267 F.2d 430. Additionally, the failure to plead arson as an affirmative defense has been held, in at least one state, to bar admission of evidence of intentional burning by an insured. Fleming vs. Unigard Mutual Ins. Co., 44 Or.App. 197, 605 P.2d 728 (1980), citing Walker vs. Fireman's Fund, 114 Or. 545, 234 P. 542 (1925).

It should be noted that COMMERCIAL UNION'S Answer and Affirmative Defenses in Wells vs. Commercial Union, Nick Demos and Lighthouse, Inc., (Case No. 81-C-592) and complained of in paragraph Fourth of

DEMOS' defamation Complaint, was filed in the Circuit Court of Racine County, State of Wisconsin before the case was removed to the U.S. District Court, Eastern District of Wisconsin. That answer was filed pursuant to the Wisconsin Rules of Civil Procedure, Chapters 801 to 807, Wis. Stats. (1979-80). Section 802.02(3), Wis. Stats., is substantially identical to Rule 8(c), Fed. R.Civ.P., and requires in the state courts of Wisconsin:

> "Affirmative Defenses. In pleading to a preceeding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: . . .fraud [and] illegality."

Section 802.03(2), Wis. Stats., is identical to Rule 9(b), Fed.R.Civ.P., and requires in the state courts of Wisconsin:

> "In all averments of fraud and mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . ."

COMMERCIAL UNION was required under both federal and state civil procedure rules and applicable case law to plead its affirmative defenses of fraud, arson and illegality. Arson is a species of fraud. Klemens vs. Badger Mutual Insurance Company of Milwaukee, 8 Wis. 2d 565, 99 N.W. 2d 865 (1959).

DEMOS does not dispute that the common law of Wisconsin grants an absolute privilege to statements pertinent to the action.[1] The Court of Appeals correctly pointed out that

> "The absence-of-jurisdiction exception to the privilege is limited to those cases in which the court does not have jurisdiction over

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[1]The privilege is suject to the qualification that such defamatory matter is pertinent or relevant to the case. Schafer vs. Suckle, 21 Wis. 2d 425, 124 N.W. 2d 577 (1963); Bromund vs. Holt, 24 Wis. 2d 336, 129 N.W. 2d 149 (1964); Novick vs. Becker, 4 Wis. 2d 432, 90 N.W. 2d 620 (1958); See also Bussewitz vs. Wisconsin Teachers Association, 188 Wis. 121, 205 N.W. 808 (1925).

> the suit. Kent vs. Connecticut Bank and Trust Co., 386 So. 2d 902 (Fla. Dist. Ct. App. 1980). . ."

Court of Appeals Decision, Plaintiff-Petitioner NICK DEMOS' Appendix, p. 3. Kent vs. Connecticut Bank and Trust Co., supra., cited by DEMOS, as well as all the other cases cited in DEMOS' Petition, pp. 10-14 reaffirms this principle. The privilege applies if the court, in which the statements complained of were made, has jurisdiction of the case, and the statements were pertinent to the case.

Not only has the United States District Court and the Court of Appeals applied the law correctly, DEMOS has not demonstrated that the application of the law is in conflict with other court decisions or that the Court of Appeals decision strays from the usual course of judicial proceedings.

II. THE DECISION OF THE UNITED STATES DISTRICT COURT AND THE COURT OF APPEALS INVOLVED WISCONSIN COMMON LAW ONLY

The United States District Court

and The Court of Appeals applied Wisconsin common law in reaching their respective decisions. Those decisions held that the alleged dissemination of the contents of COMMERCIAL UNION'S Answer and Affirmative Defenses is without liability. As pointed out by both courts, once the pleadings were filed in court, they became public records, available to all, to see and read. Court of Appeals Decision, Plaintiff-Petitioner NICK DEMOS' Appendix, pp.4-5; District Court Decision, Plainitff-Petitioner, NICK DEMOS' Appendix pp 13-14.

This question is a matter of state law. No questions or issues of federal law or policy are involved in this matter. There are no conflicting federal court decisions to reconcile. There is no reason or need for the United States Supreme Court to review this case.

CONCLUSION

The Federal District Court has

jurisdiction of the case. This jurisdiction attached to all of the affirmative defenses set forth by COMMERCIAL UNION. COMMERCIAL UNION was not only privileged, but required, to protect its rights, to set forth the affirmative defenses. The holding of the District Court and Court of Appeals is consistent with the law on this question. The balance of this case involves questions of Wisconsin common law of defamation.

The plaintiff-petitioner has failed to establish any basis or need for review of this case. There are no questions or issues of federal law or constitutional provisions. No conflict exists between this decision and that of other federal courts. The decision in this case is a matter of state law only. There is no need for review by the United States Supreme Court.

RESPECTFULLY SUBMITTED,

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By
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